BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRAD E. RAMEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 5,018,001
CESSNA AIRCRAFT COMPANY	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the March 9, 2010 Award of Review and Modification entered by Administrative Law Judge (ALJ) John D. Clark. The Workers Compensation Board heard oral argument on June 18, 2010.

APPEARANCES

Brian D. Pistotnik of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award of Review and Modification. The Board has taken administrative notice of the May 5, 2006 settlement hearing transcript. The record also includes a written Stipulation regarding claimant's average weekly wage filed by the parties with the Division of Workers Compensation on September 29, 2009.

ISSUES

This is a review and modification proceeding. On May 5, 2006, claimant, who appeared pro se, and respondent entered into a settlement for accidental injuries claimant sustained relating to a claimed date of accident of April 1, 2005, and each and every working day thereafter. The matter was settled based upon a 10 percent permanent partial functional impairment to the body as a whole on a running award basis, leaving open rights to medical benefits and review and modification.

In early December 2008, shortly after claimant received a 60-day layoff notice, claimant's employment with the respondent ended. On December 24, 2008, claimant filed an application for review and modification.

In the March 9, 2010 Award of Review and Modification, ALJ Clark determined claimant was entitled to a 50 percent work disability[1] effective December 2, 2008. The 50 percent work disability was based upon findings of a 100 percent wage loss and a 0 percent task loss. With regard to claimant's task loss, the ALJ stated:

> Dr. Murati did not give a specific percentage of task loss and it is not the duty of this Court to guess at what Dr. Murati means in his calculations. The Claimant has lost the ability to do a number of tasks. However, this Court will not speculate, and taking the 100 percent wage loss with the zero percent proven task loss, this Court finds that the Claimant now has a work disability of 50 percent.[2]

Respondent contends claimant is not entitled to a modification of his award. Respondent argues that according to the plain language of K.S.A. 44-528(a) modification of the award is inappropriate even if the claimant experienced an increased wage loss. Respondent maintains that claimant retains the ability to perform the job duties he performed at the time of his injury. It argues the plain language of K.S.A. 44-528(b) preserves the abilities test which was found in K.S.A. 44-510e(a) before the 1993 amendments were enacted. Respondent asserts the Board should conclude that in light of recent precedent, the plain language of K.S.A. 44-528(b) should be read to require a different definition of disability post award. Instead of the definition contained in K.S.A. 44-510e, an abilities test applies to review and modification proceedings and that applying the abilities test contained in K.S.A. 44-528(b), modification of claimant's award is inappropriate. Respondent argues that utilizing the work disability definition found in K.S.A. 44-510e(a) would be contrary to the holding in *Bergstrom*[3] that the Workers Compensation Act is to be strictly construed.

Respondent also argues that like the Kansas Court of Appeals in *Watkins*,[4] the Board should determine that despite his job loss, claimant has failed to present evidence that since his injury, he has experienced a change in his physical condition or ability to

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[1] A permanent partial general disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

[2] ALJ's Award of Review and Modification (March 9, 2010) at 4.

[3] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[4] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

perform work in the open labor market or earn a comparable wage. Respondent requests the Board to deny claimant's request for modification of his award.

Claimant contends the ALJ was correct in determining claimant was entitled to a modification of his award. With regard to determining claimant's work disability, claimant points to the recent Board Order in *Saffer* and quotes, in part: " . . . the standard for determining a claimant's work disability during an original proceeding as well as for purposes of a review and modification request is the same. . . . Thus, the test is claimant's actual wage earnings, post award, and not his capability to earn the same or higher wages."[5] Claimant argues that even if the Board was not taking that position pertaining to review and modification proceedings, claimant is not capable of earning the same or higher wages as on the date of accident. Further, claimant asserts that the ALJ erred in finding claimant failed to prove a task loss. Claimant contends he has proven a 69 percent task loss. Claimant states: "There is no legal requirement that Dr. Murati do the actual math for the task loss component."[6] When this 69 percent task loss is averaged with his 99 percent wage loss, claimant's work disability is 84 percent.

The issue before the Board on this appeal is:

- Whether the claimant's functional impairment or work disability has increased since his original award such that he is entitled to an increase in his permanent partial disability benefits pursuant to K.S.A. 44-528. If so, what is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of Review and Modification of the ALJ should be affirmed in part and modified in part.

Claimant worked for respondent from 1994 until 1996 or 1997 and returned to work for respondent in 2004. When he returned, he worked as a flight line mechanic.

[5] Claimant's Brief at 2 (filed Apr. 21, 2010), quoting *Saffer v. Star Construction*, No. 1,030,669, 2010 WL 1445598 (Kan. WCAB Mar. 31, 2010).

[6] Claimant's Brief at 3 (filed Apr. 21, 2010).

On April 1, 2005, claimant sustained a workplace accidental injury.[7] Claimant struck his head on the wing of a plane when he stood up quickly.[8] He felt immediate pain going down his spine, neck and shoulder.[9] When claimant reported the pain to the respondent, respondent provided medical treatment.

Claimant continued working while being treated conservatively.

Dr. Sandra Barrett assumed claimant's treatment on November 9, 2005.[10] Dr. Barrett's impression of claimant's condition was neck pain status post cervical injury with resulting radicular pain in the left upper extremity. Since claimant failed a trial of physical therapy, Dr. Barrett recommended an epidural steroid injection to the C6-C7 region. When the injection proved unsuccessful, Dr. Barrett referred claimant for a surgical evaluation.

Dr. Dickerson assumed claimant's treatment and performed surgery on claimant's neck.[11] Dr. Dickerson performed a C6-C7 anterior cervical discectomy and fusion on January 4, 2006. After the surgery, claimant wanted to return to work quickly because he was afraid of losing his job. Claimant was released to return to work on February 2, 2006, with a 30-pound weight restriction. That restriction was lifted on February 20, 2006.

Claimant returned to Dr. Barrett for examination on March 30, 2006. At that time, Dr. Barrett opined claimant was at maximum medical improvement and could continue to work without any restrictions. In an April 19, 2006, letter, Dr. Barrett opined claimant sustained a 10 percent whole person impairment according to the AMA *Guides* (4th ed.).[12]

Using Dr. Barrett's rating, claimant entered into a settlement on May 5, 2006, with the respondent on his workers compensation claim. Claimant appeared pro se. The settlement resulted in an award of $19,380.50 in permanent partial disability benefits plus

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[7] R.M.H. Trans. at 7.

[8] *Id.*, at 8.

[9] *Id.*, at 9.

[10] Barrett Depo., Ex. 2.

[11] R.M.H. Trans. at 14.

[12] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

payment of medical expenses. In addition, $1,858.86 had been paid in temporary total disability benefits.[13]

On December 1, 2008, claimant received a layoff notice from respondent. The record indicates December 3, 2008, was the last day claimant worked for respondent.[14] Although claimant has put significant effort into securing employment, he remains unemployed. Subsequent to his layoff, claimant has dabbled in starting a painting business. At the time of the July 2009 review and modification hearing, the business had only netted a few hundred dollars after expenses in the seven months since claimant's employment with respondent ended. Claimant indicated he uses subcontractors to perform most of the work.[15]

Claimant believes his condition has worsened since Dr. Barrett rated him in April 2006.[16] He testified he experiences shoulder pain, numbness in his arms and fingers, and headaches.[17] He also testified that he feels he now needs restrictions because he is in pain all the time.[18] Claimant testified he has modified his normal activities and does not run or jog as often as he should because of neck pain.

At the request of claimant's attorney, Dr. Pedro A. Murati examined and evaluated claimant on March 11, 2009. Dr. Murati assigned claimant a 25 percent whole person impairment based on the DRE (Diagnosis-Related Estimates) Cervicothoracic Category IV.[19] Dr. Murati opined that the 25 percent impairment rating was directly attributable to the April 2005 work-related accident. Dr. Murati also opined that claimant needs permanent work restrictions.[20] The work restrictions recommended were: no climbing ladders, crawling, or lifting/carrying/pushing/pulling over 35 pounds; limit lifting/carrying/pushing/pulling to no more than 35 pounds on an occasional basis and no more than 20 pounds on a frequent basis; no work more than 24 inches from the body

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[13] Medical benefits and review and modification were left open.

[14] Gilbert Depo. at 17.

[15] R.M.H. Trans. at 47.

[16] *Id.*, at 22.

[17] *Id.*

[18] *Id.*, at 30.

[19] Murati Depo. at 5 and Ex. 2.

[20] *Id.*, at 7.

(both arms); and avoid awkward positions of the neck.[21] Dr. Murati also reviewed the task list report[22] prepared by vocational expert Jerry D. Hardin. The report indicated the claimant had 28 different jobs in the 15 years before the April 2005 accident and 115 nonduplicative tasks were identified. Reviewing the form, Dr. Murati placed an "N" on 78 job tasks that were contraindicated.[23] In this way, Dr. Murati indicated a 68 percent task loss opinion in his review of the job tasks.

The ALJ found that Dr. Murati did not give a specific percentage of task loss and, consequently, concluded the claimant had a 0 percent task loss. The Board rejects the ALJ's rationale.

K.S.A. 44-510e(a) states, in pertinent part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed . . . .

Dr. Murati did express his opinion as to the number of job tasks the claimant could not perform by placing an "N" on each of the tasks that were contraindicated. From that information a task loss percentage can be computed. The statute does not require the physician to actually perform the computation. Therefore, the Board finds that Dr. Murati did provide a task loss opinion of 68 percent.

In March 2006, Dr. Barrett opined claimant was at maximum medical improvement and could work without restrictions. Working without restrictions results in a 0 percent task loss. While it may not have been necessary for claimant to have work restrictions in 2006, that is not the situation today. This constitutes a requisite change of circumstances for purposes of K.S.A. 44-528. Claimant testified that he believes his condition has worsened and that he is in constant pain. Claimant believes he needs work restrictions. Dr. Murati agrees.

K.S.A. 44-528 states:

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be

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[21] *Id.*, at 7, 8 and Ex. 2.

[22] *Id.*, Ex. 3.

[23] *Id.*, at 9.

> reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.
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> (b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.
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> (c) The number of reviews under this section shall be limited pursuant to rules and regulations adopted by the director to avoid abuse.
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> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

In the settlement entered on May 5, 2006, claimant was granted a 10 percent permanent partial whole body functional disability for the injuries suffered on April 1, 2005. Claimant continued in the employ of respondent until December 3, 2008. The review and modification was then filed on December 24, 2008. Therefore, any modification of this award, if appropriate, will take effect on the date following claimant's termination.

Claimant does not argue that his functional disability has increased. But, rather, claimant argues that his task loss has increased and the loss of his job has resulted in wage loss.

The Kansas Supreme Court, in *Bergstrom*[24], requires that the fact finder follow and apply the plain language of K.S.A. 44-510e which requires that a post-injury wage loss must be based upon the actual average weekly wage claimant earned while working as compared to the average weekly wage claimant is earning after the injury. In looking at the resulting wage loss, *Bergstrom* does not ask why. It merely calculates the loss and applies the resulting number. Here, claimant is unemployed. Therefore, the wage loss difference is 100 percent. This review and modification proceeding simply addresses whether claimant's permanent partial disability has increased. Claimant has an increased wage loss and task loss; thus, his permanent partial disability is no longer limited to his percent of functional impairment. His permanent partial disability is defined as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[25]

Claimant's wage loss has increased to 100 percent and his task loss has increased. Therefore, the disability has clearly increased and a modification is required.

The dissent attached to this decision argues that the language of K.S.A. 44-510e differs from the language of K.S.A. 44-528. The Kansas Supreme Court, recently in *Bergstrom*, eliminated the requirement that a claimant prove good faith in a post-award job search. The Court ruled that, where the language of a statute is clear, it is not the obligation of a court to resort to statutory construction or to speculate as to legislative intent. The language of K.S.A. 44-510e mandates that once an injured worker is no longer earning 90 percent or more of his or her pre-injury average weekly wage, then the measure of disability is the percentage of task loss averaged with the percentage of wage loss. However, there is a statutory distinction between the work disability calculation in K.S.A. 44-510e and the post-award review and modification language in K.S.A. 44-528, which asks if the worker is earning or is capable of earning the same or higher wages. If so, the original award may be modified, reduced, or eliminated entirely.

Whether the definition of disability is different post award from what it is pre award is a question that has yet to be determined by the appellate courts in Kansas since the

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[24] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[25] K.S.A. 44-510e(a).

Bergstrom decision was issued. The Kansas Court of Appeals, as affirmed by the Kansas Supreme Court, did address the issue pre *Bergstrom*. In *Asay*[26], the Court was asked to determine if the language in K.S.A. 44-528 dealing with an employee's capability to earn the same or higher wages altered the test for determining compensable permanent partial general disability under K.S.A. 44-510e. The Court was comparing the claimant's ability to engage in work of the same type and character that he was performing at the time of his injury (the then effective test for work disability) to the language of K.S.A. 44-528. The Court determined that the language of K.S.A. 44-528 did not justify cancellation of an award unless the claimant had regained the "ability . . . to engage in work of the same type and character that he was performing at the time of his injury."[27] The Court also determined that the language of K.S.A. 44-510e, which had been modified in 1974, trumped the older language in K.S.A. 44-528, ruling that "where there is a conflict between two statutes which cannot be harmonized, the later legislative expression controls."[28]

The Board finds that the specific definition of permanent partial disability in K.S.A. 44-510e controls in this matter over the general language in K.S.A. 44-528 and reflects the legislature's most recent expression of its intent on how permanent partial general (work) disability awards are to be computed. Thus, the test is claimant's actual wage earnings, post award, and not his capability to earn the same or higher wages.

As to task loss, the Board finds both Dr. Barrett and Dr. Murati credible and, consequently, will average the task loss opinions of the two physicians. Dr. Barrett's testimony could be interpreted as indicating there would be no task loss as she failed to place work restrictions on claimant and Dr. Murati opined claimant had a 68 percent task loss. The resulting task loss is 34 percent for the claimant.

K.S.A. 44-510e, thus, requires that the wage loss and task loss be averaged, with the numerical result being the work disability. Here, a 34 percent task loss averaged with a 100 percent wage loss results in a work disability of 67 percent effective December 4, 2008.

The Board affirms the ALJ's conclusions that claimant's award should be modified, claimant is entitled to work disability and claimant's wage loss is 100 percent. The Board modifies the ALJ's determination regarding task loss and the effective date of the review and modification award. Consequently, the award of compensation is modified.

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[26] *Asay v. American Drywall*, 11 Kan. App. 2d 122, 715 P.2d 421, aff'd 240 Kan. 52, 726 P.2d 1332 (1986).

[27] *Id.*, at Syl. ¶ 4.

[28] *Id.*, at 126.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Review and Modification of Administrative Law Judge John D. Clark dated March 9, 2010, should be, and is hereby, affirmed in part and modified in part.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant and against the self-insured respondent, Cessna Aircraft Company, for an accidental injury which occurred April 1, 2005**.**

Effective December 4, 2008, Mr. Ramey is entitled to receive 175.41 weeks of permanent partial disability benefits at $449 per week, or $78,760.64 ($100,000[29] less $1,858.86 in temporary total disability benefits[30] and $19,380.50 in permanent partial disability benefits[31] previously paid pursuant to the May 5, 2006 settlement) for a 67 percent permanent partial disability and a total award not to exceed $100,000.

As of August 5, 2010, Mr. Ramey is entitled to receive 87.14 weeks of permanent partial disability compensation at $449 per week in the sum of $39,125.86, for a total due and owing of $39,125.86, which is ordered paid in one lump sum less any amounts paid since the May 5, 2006 settlement. Thereafter, the remaining balance of $39,634.78 shall be paid at $449 per week until paid or until further order of the Director.

Claimant's attorney may present any request for attorney fees to the ALJ.[32]

The Board adopts the remaining orders set forth in the Award of Review and Modification to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

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[29] In this instance, claimant is entitled to the maximum amount of disability compensation, which is $100,000.

[30] According to the May 5, 2006 settlement, this was based on 4.14 weeks at the rate of $449 per week.

[31] According to the May 5, 2006 settlement, this was based on 41.58 weeks at the rate of $467 per week. The Board acknowledges the numbers generated at the time of the settlement hearing are not mathematically accurate, but the Board is bound by the parties' stipulations.

[32] K.S.A. 44-536(g).

Dated this ____ day of August, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the award of the majority. K.S.A. 44-528 is specific in directing the method of determining whether a modification of an award is proper. The statute requires a determination of an employee's capability to earn equal or greater wages than that being earned at the time of the accident. The Supreme Court, in an opinion which sent shock waves through the workers compensation bar in Kansas, was very specific in *Bergstrom*[33] in determining that the Court's obligation is to give effect only to express statutory language, rather than speculating on what the law should or should not be. The Court of Appeals, more recently, when discussing *Bergstrom* in *Tyler*[34], noted that judicial notions regarding the legislature's intent in the enactment of K.S.A. 44-510e(a) are not favored. The Court in *Tyler* went on to warn that "[j]udicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent."[35]

The judicial intent contained in K.S.A. 44-528 requires a determination as to whether a claimant is capable of earning the same or higher wages as those being earned on the date of accident. Here, claimant has the ability to return to the same job with respondent, earning the same wages and receiving the same fringe benefits. The only thing preventing this result is the termination due to claimant's layoff from his job with respondent.

[33] *Bergstrom, supra.*

[34] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[35] *Id.*, at 391.

Claimant's earning "capability" is not in dispute with regard to his former unaccommodated job with respondent. In this instance, claimant had returned to his original job with respondent. Even under *Asay*[36] cited by the majority, this claimant retains the "ability . . . to engage in work of the same type and character that he was performing at the time of his injury."[37] Therefore, claimant should be limited to his functional impairment pursuant to K.S.A. 44-528 and denied additional permanent partial general disability under K.S.A. 44-510e.

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent
John D. Clark, Administrative Law Judge

[36] *Asay*, *supra*.

[37] *Id.*, at Syl. ¶ 4.